

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD) •Elevation in feet (NAVD)	
				Existing	Modified

Maps available for inspection at the Atkinson Town Hall, 200 North Town Hall Avenue, Atkinson, North Carolina.

Send comments to The Honorable George Stalker, Mayor of the Town of Atkinson, 200 North Town Hall Avenue, Atkinson, North Carolina 28421.

North Carolina .....	Orange County (Unincorporated Areas).	Haw River .....	At the Orange/Chatham County boundary	None	•415
			Approximately 1.2 miles upstream of East Greensboro-Chapel Hill Road.	None	•429

Maps available for inspection at the Orange County Planning and Inspections Department, 306F Revere Road, Hillsborough, North Carolina.

Send comments to Mr. John M. Link, Jr., Orange County Manager, 200 South Cameron Street, Hillsborough, North Carolina 27278.

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")

Dated: June 5, 2006.

**David I. Maurstad,**

Director, Mitigation Division, Federal Emergency Management Agency, Department of Homeland Security.

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**RIN 1018-AU48**

**Endangered and Threatened Wildlife and Plants; Amended Designation of Critical Habitat for the Wintering Population of the Piping Plover**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to amend critical habitat for the wintering population of the piping plover (*Charadrius melodus*) in North Carolina under the Endangered Species Act of 1973, as amended (Act). In total, approximately 1,827 acres (ac) (739 hectares (ha)) fall within the boundaries of the proposed amended critical habitat designation, located in Dare and Hyde counties, North Carolina.

**DATES:** We will accept comments from all interested parties until August 11, 2006. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by July 27, 2006.

**ADDRESSES:** If you wish to comment, you may submit your comments and materials concerning this proposal by any one of the following methods:

1. You may submit written comments and information to Pete Benjamin, Field Supervisor, U.S. Fish and Wildlife Service, Raleigh Fish and Wildlife Office, P. O. Box 33726, Raleigh, North Carolina 27636-3726.

2. You may hand-deliver written comments to our office, at Raleigh Field Office, 551-F Pylon Drive, Raleigh, North Carolina 27606.

3. You may send comments by electronic mail (e-mail) to [ncplovercomments@fws.gov](mailto:ncplovercomments@fws.gov). Please see the "Public Comments Solicited" section under **SUPPLEMENTARY INFORMATION** for file format and other information about electronic filing.

4. You may fax your comments to 919-856-4556.

5. Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Raleigh Fish and Wildlife Office, 551-F Pylon Drive, Raleigh, North Carolina 27606 (telephone 919-856-4520).

**FOR FURTHER INFORMATION CONTACT:** Pete Benjamin, Field Supervisor, Raleigh Fish and Wildlife Office, telephone 919-856-4520, facsimile 919-856-4556.

**SUPPLEMENTARY INFORMATION:**

**Public Comments Solicited**

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. We particularly seek comments concerning:

(1) The reasons any habitat should or should not be determined to be critical

habitat as provided by section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of wintering piping plover habitat in North Carolina, and what areas should be included in the designation that were occupied at the time of listing that contain the features that are essential for the conservation of the species and why, and what areas were not occupied at the listing is essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities;

(5) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments;

(6) Whether our determination that areas identified as not being in need of special management is accurate; and

(7) Information to assist the Secretary of the Interior in evaluating habitat with physical and biological features essential to the conservation of the piping plover on Cape Hatteras National Seashore, administered by the National Park Service, based on any benefit provided by the Interim Protected Species Management Strategy/ Environmental Assessment (Interim Strategy) to the conservation of the wintering piping plover.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of

several methods (see **ADDRESSES** section). Please submit e-mail comments to [ncplovercomments@fws.gov](mailto:ncplovercomments@fws.gov) in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn: Wintering Piping Plover Critical Habitat" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Raleigh Fish and Wildlife Office at phone number 919-856-4520. Please note that the e-mail address [ncplovercomments@fws.gov](mailto:ncplovercomments@fws.gov) will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment, but you should be aware that the Service may be required to disclose your name and address under the Freedom of Information Act. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the Raleigh Fish and Wildlife Office (see **ADDRESSES**).

#### **Role of Critical Habitat in Actual Practice of Administering and Implementing the Act**

Attention to and protection of habitat is paramount to successful conservation actions. The role that designation of critical habitat plays in protecting habitat of listed species, however, is often misunderstood. As discussed in more detail below in the discussion of exclusions under section 4(b)(2) of the Act, there are significant limitations on the regulatory effect of designation under section 7(a)(2) of the Act. In brief, (1) designation provides additional protection to habitat only where there is a Federal nexus; (2) the protection is

relevant only when, in the absence of designation, destruction or adverse modification of the critical habitat would in fact take place (in other words, other statutory or regulatory protections, policies, or other factors relevant to agency decision-making would not prevent the destruction or adverse modification); and (3) designation of critical habitat triggers the prohibition of destruction or adverse modification of that habitat, but it does not require specific actions to restore or improve habitat.

Currently, only 475 species, or 36 percent of the 1,312 listed species in the U.S. under the jurisdiction of the Service, have designated critical habitat. We address the habitat needs of all 1,312 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, the section 10 incidental take permit process, and cooperative, nonregulatory efforts with private landowners. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

In considering exclusions of areas proposed for designation, we evaluated the benefits of designation in light of *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir 2004). In that case, the Ninth Circuit invalidated the Service's regulation defining "destruction or adverse modification of critical habitat." In response, on December 9, 2004, the Director issued guidance to be considered in making section 7 adverse modification determinations. This proposed critical habitat designation does not use the invalidated regulation in our consideration of the benefits of including areas in this final designation. The Service will carefully manage future consultations that analyze impacts to designated critical habitat, particularly those that appear to be resulting in an adverse modification determination. Such consultations will be reviewed by the Regional Office prior to finalizing to ensure that an adequate analysis has been conducted that is informed by the Director's guidance.

On the other hand, to the extent that designation of critical habitat provides protection, that protection can come at significant social and economic cost. In addition, the mere administrative process of designation of critical habitat is expensive, time-consuming, and controversial. The current statutory framework of critical habitat, combined with past judicial interpretations of the

statute, make critical habitat the subject of excessive litigation. As a result, critical habitat designations are driven by litigation and courts rather than biology, and made at a time and under a time frame that limits our ability to obtain and evaluate the scientific and other information required to make the designation most meaningful.

In light of these circumstances, the Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

#### **Procedural and Resource Difficulties in Designating Critical Habitat**

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court-ordered designations have left the Service with limited ability to provide for public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the

economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4371 *et seq.*). These costs, which are not required for many other conservation actions, directly reduce the funds available for direct and tangible conservation actions.

### Background

In this proposed rule, it is our intent to discuss only those topics directly relevant to the amended designation of critical habitat for the wintering population of piping plover in North Carolina. For more information on piping plover wintering critical habitat, refer to the final rule designating critical habitat for the wintering population of the piping plover published in the **Federal Register** on July 10, 2001 (66 FR 36038).

The piping plover is a small, pale-colored shorebird that breeds in three separate areas of North America—the Northern Great Plains, the Great Lakes, and the Atlantic Coast. The piping plover winters in coastal areas of the United States from North Carolina to Texas, along the coast of eastern Mexico, and on Caribbean islands from Barbados to Cuba and the Bahamas (Haig and Elliott-Smith 2004). Information from observation of color-banded piping plovers indicates that the winter ranges of the breeding populations overlap to a significant degree. Therefore, the source breeding population of a given wintering individual cannot be determined in the field unless it has been banded or otherwise marked.

Piping plovers begin arriving on the wintering grounds in July, with some late-nesting birds arriving in September. A few individuals can be found on the wintering grounds throughout the year, but sightings are rare in late May, June, and early July. Migration is poorly understood, but a recent study suggests that plovers use inland and coastal stopover sites when migrating from interior breeding areas to wintering grounds (V.D. Pompei and F. J. Cuthbert, unpublished data). Concentrations of spring and fall migrants also have been observed along the Atlantic Coast (USFWS 1996). In late February, piping plovers begin leaving the wintering grounds to migrate back to breeding sites. Northward migration peaks in late March, and by late May most birds have left the wintering grounds (Haig and Elliott-Smith 2004). North Carolina is uniquely positioned in the species' range, being the only State where the piping plover's

breeding and wintering ranges overlap and the birds are present year-round. A complete description of the biology and ecology of the piping plover can be found in Haig and Elliott-Smith (2004).

### Previous Federal Actions

The piping plover was listed as endangered in the Great Lakes watershed and threatened elsewhere within its range on December 11, 1985 (50 FR 50726). All piping plovers on migratory routes outside of the Great Lakes watershed or on their wintering grounds (which include the State of North Carolina) are listed as threatened under the Act.

On July 10, 2001, we designated 137 areas along the coasts of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas as critical habitat for the wintering population of the piping plover (66 FR 36038). This designation included approximately 1,798.3 miles (mi) (2,891.7 kilometers (km)) of mapped shoreline and approximately 165,211 ac (66,881 ha) of mapped areas along the Gulf and Atlantic coasts and along margins of interior bays, inlets, and lagoons.

In February 2003, two North Carolina counties (Dare and Hyde) and a beach access group (Cape Hatteras Access Preservation Alliance) filed a lawsuit challenging our designation of four units of critical habitat on the Cape Hatteras National Seashore, North Carolina (Units NC-1, NC-2, NC-4, and NC-5). In its November 1, 2004 opinion, the court vacated and remanded the designation for these units to us for reconsideration (*Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior* (344 F. Supp. 2d 108 (D.D.C. 2004))). The court indicated that the descriptions of critical habitat for the four units did not sufficiently exclude certain hard structures and other areas that did not contain primary constituent elements (PCEs) and ordered us to demonstrate that PCEs are found on areas that are designated. Also, although the court did not invalidate the PCEs themselves, it ordered us to clarify that the PCEs may require special management or protection pursuant to the Act. It also found that the designation of critical habitat must include compliance with NEPA. Furthermore, the court found that our economic analysis of the critical habitat designation was arbitrary and capricious in that it considered the impact of off-road vehicles and other human use of beaches but did not address information in the record about the possibility of closures of the beaches to such use or how off-road vehicle use might be

affected by the designation. Finally, the court also found that we may have omitted from the economic analysis the costs of consulting on National Park Service actions, and ordered us to reconsider them. This proposed rule will address only those four court-vacated and -remanded units (Units NC-1, NC-2, NC-4, and NC-5), with the exception of corrections to the List of Endangered and Threatened Wildlife found at 50 CFR 17.11(h) and minor edits to the regulatory language found in 50 CFR 17.95(b). All other areas remain as designated in the July 10, 2001, final critical habitat rule (66 FR 36038).

For more information on previous Federal actions concerning the piping plover, refer to the final listing rule published in the **Federal Register** on December 11, 1985 (50 FR 50726), or the final rule designating critical habitat for the wintering population of the piping plover published in the **Federal Register** on July 10, 2001 (66 FR 36038).

### Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse

modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7 is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures.

To be included in a critical habitat designation, the habitat within the area occupied by the species must first have features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).) Accordingly, when the best available scientific data do not demonstrate that the conservation needs of the species require additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but not known to be occupied at the time of listing will likely, but not always, be essential to the conservation of the species and, therefore, typically included in the critical habitat designation.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing rule

for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

#### Methods

As required by section 4(b) of the Act, we use the best scientific data available in determining areas that contain the physical and biological features that are essential to the conservation of the wintering population of the piping plover. We reviewed available information that pertains to the habitat requirements of this species. The material reviewed included data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits,

research published in peer-reviewed articles and presented in academic theses and agency reports, and recovery plans. To determine the most current distribution of piping plover in North Carolina, these areas were further evaluated using wintering piping plover occurrence data from the North Carolina Wildlife Resources Commission, the North Carolina Natural Heritage Program, and three international piping plover winter population censuses. We considered these data along with other occurrence data (including presence/absence survey data), research published in peer-reviewed articles and presented in academic theses and agency reports, and information received during the development of the July 10, 2001, designation of critical habitat for wintering piping plovers (see final rule at 66 FR 36038). To map areas containing the physical and biological features determined to be essential to the conservation of the species (see *Primary Constituent Elements for the Wintering Population of the Piping Plover* section below), we used data on known piping plover wintering locations, regional Geographic Information Systems (GIS) coverages, digital aerial photographs, and regional shoreline-defining electronic files.

We have included those areas containing essential features along the coast for which occurrence data indicate a consistent use (observations over two or more wintering seasons) by piping plovers within this designation. We do not propose any areas outside the geographical area presently occupied by the species.

Delineating specific locations for designation as critical habitat for the piping plovers is difficult because the coastal areas they use are constantly changing due to storm surges, flood events, and other natural geophysical alterations of beaches and shoreline. Thus, to best ensure that areas containing features considered essential to the piping plover are included in this proposed designation, the textual unit descriptions of the units in the regulation constitute the definitive determination as to whether an area is within the critical habitat boundary. Our textual legal descriptions describe the area using reference points, including the areas from the landward boundaries to the mean of the lower low water (MLLW) (which encompasses intertidal areas with the features that are essential foraging areas for piping plovers), and describe areas within the unit that are utilized by the piping plover and contain the PCEs (e.g., upland areas used for roosting and wind tidal flats used for foraging). Our textual

legal descriptions also exclude features and structures (e.g., buildings, roads) that are not or do not contain PCEs.

In order to capture the dynamic nature of the coastal habitat, and the intertidal areas used by the piping plover, we have textually described each unit as including the area from the MLLW height of each tidal day, as observed over the National Tidal Datum Epoch, landward to a point where PCEs no longer occur. The landward edge of the PCEs is generally demarcated by stable, densely-vegetated dune habitat which nonetheless may shift gradually over time.

Global Positioning System (GPS) data were gathered using a mobile handheld mapping unit with settings to allow for post processing or Wide Area Augmentation System (WAAS) enabled correction. A minimum of five positions were captured for each point location. Data were processed using mapping software and the points were output to a shapefile format. The point shapefile was checked for attribute accuracy and additional data fields were added to assign feature type. GIS point data were used to create lines. The lines were overlaid on National Oceanic and Atmospheric Administration digital ortho-photographs and U.S. Geological Survey digital ortho-photographs. These lines were refined to create the landward edge of the critical habitat polygons. To complete the polygons, a boundary was drawn in the ocean or sound to demarcate the MLLW. The line was drawn using 20-foot Light Detection and Ranging (LIDAR) and contours to estimate the location of MLLW.

#### Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we consider those physical and biological features (PCEs) that are essential to the conservation of the species, and within areas occupied by the species at the time of listing, that may require special management considerations and protection. These include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific primary constituent elements required for the wintering population of the piping plover are

derived from the biological needs of the species, as described in the Background section of the final rule designating critical habitat for the wintering population of the piping plover published in the **Federal Register** on July 10, 2001 (66 FR 36038).

#### *Primary Constituent Elements for the Wintering Population of the Piping Plover*

Pursuant to our regulations, we are required to identify the known physical and biological features (i.e., primary constituent elements (PCEs)) essential to the conservation of the wintering population of the piping plover. All areas proposed as critical habitat for the wintering population of the piping plover are occupied, within the species' historic geographical range, and contain sufficient PCEs to support at least one life history function.

In *Cape Hatteras Access Preservation Alliance v. U.S. Dept of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), the Court upheld the PCEs identified in our July 10, 2001, final rule designating critical habitat for the wintering population of the piping plover (66 FR 36038). Thus, based on the best available scientific information, we are not changing PCEs previously identified. They constitute the features that are essential for the conservation of wintering piping plovers. The PCEs are found in geologically dynamic coastal areas that support intertidal beaches and flats (between annual low tide and annual high tide) and associated dune systems and flats above annual high tide.

Essential components (primary constituent elements) of wintering piping plover habitat include sand and/or mud flats with no or very sparse emergent vegetation. In some cases, these flats may be covered or partially covered by a mat of blue-green algae. Adjacent unvegetated or sparsely vegetated sand, mud, or algal flats above high tide are also essential, especially for roosting piping plovers. Such sites may have debris, detritus (decaying organic matter), or micro-topographic relief (less than 50 cm above substrate surface) offering refuge from high winds and cold weather. Essential components of the beach/dune ecosystem include surf-cast algae for feeding of prey, sparsely vegetated backbeach (beach area above mean high tide seaward of the dune line, or in cases where no dunes exist, seaward of a delineating feature such as a vegetation line, structure, or road) for roosting and refuge during storms, spits (a small point of land, especially sand, running into water) for feeding and roosting, salterns (bare sand flats in the center of

mangrove ecosystems that are found above mean high water and are only irregularly flushed with sea water) and washover areas for feeding and roosting. Washover areas are broad, unvegetated zones with little or no topographic relief that are formed and maintained by the action of hurricanes, storm surge, or other extreme wave action. Several of these components (sparse vegetation, little or no topographic relief) are mimicked in artificial habitat types used less commonly by piping plovers, but that are considered critical habitat (e.g., dredge spoil sites).

This proposed designation is designed for the conservation of PCEs necessary to support the life history functions of piping plover. Because not all life history functions require all the PCEs, not all proposed critical habitat will contain all the PCEs.

Each of the areas proposed in this rule have been determined to contain sufficient PCEs to provide for one or more of the life history functions of the wintering population of the piping plover. In some cases, the PCEs exist as a result of ongoing Federal actions. As a result, ongoing Federal actions at the time of designation will be included in the baseline in any consultation conducted subsequent to this designation.

#### Criteria Used To Identify Critical Habitat

We are proposing to designate critical habitat on certain lands in North Carolina that we have determined contain habitat with features essential to the conservation of the wintering population of the piping plover. As required by section 4(b)(1)(A) of the Act, we use the best scientific data available in determining areas that contain the features that are essential to the conservation of the wintering population of the piping plover, as discussed in the "Methods" section above.

The units were delineated by compiling existing relevant spatial data of the unit descriptions described in our 2001 final rule designating critical habitat for the wintering population of the piping plover (66 FR 36038), generating new on-the-ground GPS base-mapping to refine the existing descriptions, and mapping the descriptions in such a manner that the units contain the PCEs (as described) and do not contain any structures or other features that are not identified as PCEs. To the maximum extent possible, unit boundaries were drawn to exclude manmade structures or their ancillary facilities. To ensure that no manmade features are included in critical habitat,

these features are expressly excluded by text in the Regulations Promulgation section of the rule. Critical habitat starts immediately at the edge of such features. Using the information compiled above, GIS was used to analyze and integrate the relevant data layers for the areas of interest in order to determine those areas that include PCEs. See "Methods" section above for additional discussion of mapping techniques.

We excluded areas from consideration that did not contain one or more of the proposed PCEs or where: (1) The area was highly degraded and may not be restorable; (2) the area was small, highly fragmented, or isolated and may provide little or no long-term conservation value; and (3) other areas within the geographic region were determined to be sufficient to meet the species needs for conservation. We included areas containing one or more PCEs where occurrence data exists and where the area: (1) Provided a patchwork of the features essential for the conservation of the species; (2) offered dispersal capabilities or were in proximity to other wintering piping plover occurrences that would allow for survival and recolonization following major natural disturbance events (e.g., nor'easters, hurricanes); (3) were of sufficient size to maintain the physical and biological features that support occurrences; and (4) were representative of the historic geographic distribution of occupied areas that will help prevent further range collapse of the species. Areas are proposed based on them containing sufficient PCEs to support wintering piping plover life processes.

Within the area (NC-1, NC-2, NC-4, NC-5) vacated and remanded to the Service for reconsideration in *Cape Hatteras Access Preservation Alliance v. U.S. Dept of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), we found no unoccupied areas essential to the conservation of the species and therefore propose no areas in North Carolina outside the geographical area presently occupied by the species. We are proposing to designate critical habitat on lands that we have determined were occupied at the time of listing and contain sufficient PCEs to support life history functions essential for the conservation of the species.

#### Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing and containing the primary constituent elements may require special management considerations or

protections. As we undertake the process of designating critical habitat for a species, we first evaluate lands defined by those physical and biological features essential to the conservation of the species for inclusion in the designation under section 3(5)(A) of the Act. Secondly, we evaluate lands defined by those features to assess whether they may require special management considerations or protection. Primary threats to the wintering population of piping plover that may require special management or protection are disturbance of foraging and roosting plovers (e.g., by flushing birds or disrupting normal feeding or roosting times and causing excessive alertness or abandonment of the area) by humans (e.g., walking on the beach, flying kites, shooting fireworks), vehicles (e.g., driving on the beach), and domestic animals (e.g., pets being turned loose on the beach); predation (e.g., increased numbers of predators that are attracted to the human presence); and disturbance to and loss of habitat due to uncontrolled recreational access (e.g., off-road vehicles, pedestrians, domestic animals) and beach stabilization efforts (e.g., beach nourishment, sediment dredging and disposal, inlet channelization, construction of jetties and groins and other hard structures) that prevent natural coastal processes (i.e., the natural transfer and erosion and accretion of sediments along the ocean shoreline). To address the threats affecting the wintering population of the piping plover within each of the proposed critical habitat units, certain special management actions may be needed. For example, the high level of off-road vehicle (ORV) and pedestrian use of the areas, as discussed in the critical habitat unit descriptions below, may require managing access to piping plover foraging habitat and adjacent upland roosting habitat during migration and overwintering periods. Managing access to these foraging and roosting areas may assist in the protection of PCEs and piping plovers by reducing disturbance to PCEs potentially caused by ORV use, pedestrians, and pets. Managing access might also improve the available habitats for conservation of piping plovers.

In addition, in evaluating areas proposed for the designation of critical habitat, we have determined that the following areas which contain the PCEs do not require special management or consideration and therefore are not proposed for designation. Please see "Application of Section 3(5)(A) and

Exclusions Under Section 4(b)(2) of the Act" for additional discussion concerning our determination on these lands.

(1) The following islands owned by the State of North Carolina located within or in proximity to Oregon, Hatteras, and Ocracoke inlets, in Dare and Hyde counties: DR-005-05 and DR-005-06 (Oregon Inlet, Dare County) and DR-009-03/04 (Hatteras Inlet, Dare and Hyde counties). These islands are specifically managed for waterbirds by the North Carolina Wildlife Resources Commission. The Commission has developed a conservation strategy that identifies the piping plover as a priority species needing research, survey, and monitoring efforts to assist in restoration and conservation efforts.

(2) 237 ac (96 ha) of Pea Island National Wildlife Refuge (Dare County). The refuge has a statutory mandate to manage the refuge for the conservation of listed species, and a draft Comprehensive Conservation Plan (USFWS 2006) provides a detailed implementation plan which includes preserving, protecting, creating, restoring and managing foraging and roosting habitats for the piping plover.

#### Proposed Amended Critical Habitat Designation

We are proposing four units of critical habitat in North Carolina for the wintering population of the piping plover. The critical habitat units described below constitute our best assessment, at this time, of the areas determined to be occupied at the time of listing, that contain one or more of the primary constituent elements and that may require special management or protection. The four areas proposed as critical habitat in this amendment are: Unit NC-1 Oregon Inlet, Unit NC-2 Cape Hatteras Point, Unit NC-4 Hatteras Inlet, and Unit NC-5 Ocracoke Island, as described below. These units cover the same general areas as those vacated by *Cape Hatteras Access Preservation Alliance v. U.S. Dept of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), although they have been refined to exclude areas that do not contain the PCEs or require special management or protection and to reflect mapping techniques conducted in compliance with the court order. For ease of future management, these units are retaining the same naming as used in the July 10, 2001, critical habitat designation (66 FR 36038). In addition, this rule does not propose to alter or in any way amend the remaining 133 units of designated critical habitat that were not vacated by *Cape Hatteras Access Preservation*

*Alliance v. U.S. Dept of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004).

The approximate area encompassed within each proposed critical habitat unit is shown in Table 1.

TABLE 1.—CRITICAL HABITAT UNITS PROPOSED FOR THE WINTERING POPULATION OF THE PIPING PLOVER IN NORTH CAROLINA.

[Area estimates reflect all land within critical habitat unit boundaries.]

Critical habitat unit	Land ownership	Acres/Hectares
Unit NC-1 Oregon Inlet .....	Federal .....	284.0 (114.9)
Unit NC-2 Cape Hatteras Point .....	Federal .....	645.8 (261.4)
Unit NC-4 Hatteras Inlet .....	Federal .....	395.6 (160.1)
Unit NC-5 Ocracoke Island .....	Federal .....	501.8 (203.0)
Total .....	.....	1827.2 (739.4)

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the wintering population of the piping plover, below. These units contain the features essential to the conservation of the species. Areas within the units contain a contiguous mix of intertidal beaches and sand and/or mud flats (between annual low tide and annual high tide) with no or very sparse emergent vegetation, and adjacent areas of unvegetated or sparsely vegetated dune systems and sand and/or mud flats above annual high tide. While no one portion of the proposed units contains every PCE, each unit contains sufficient PCEs to support life history functions essential for the conservation of the species.

#### *Unit NC-1: Oregon Inlet*

Unit NC-1 is approximately 1.7 mi (2.8 km) long, and consists of 284 ac (114.9 ha) of sandy beach and inlet spit habitat on Bodie Island in Dare County, North Carolina. This is the northernmost critical habitat unit proposed within the wintering range of the piping plover and is entirely within the Cape Hatteras National Seashore. Oregon Inlet is the northernmost inlet in coastal North Carolina, approximately 12 mi (19.3 km) southeast of the Town of Manteo, the county seat of Dare County. The proposed unit at Oregon Inlet is bounded by the Atlantic Ocean on the east and Pamlico Sound on the west and includes lands from the MLLW on the Atlantic Ocean shoreline to the line of stable, densely vegetated dune habitat (which is not used by piping plovers and where primary constituent elements do not occur) and from the MLLW on the Pamlico Sound side to the line of stable, densely vegetated habitat, or (where a line of stable, densely vegetated dune habitat does not exist) lands from MLLW on the Atlantic Ocean shoreline to the MLLW on the Pamlico Sound side. It begins at

the edge of Ramp 4 near the Oregon Inlet Fishing Center on Bodie Island and extends approximately 1.7 mi (2.8 km) south to Oregon Inlet, and includes Green Island and any emergent sandbars south and west of Oregon Inlet. This unit contains the features essential to the conservation of the species (i.e., PCEs), as discussed above.

As we discuss in “Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act” below, this unit does not include Pea Island National Wildlife Refuge or lands owned by the State of North Carolina such as islands DR-005-05 and DR-005-06. In addition, this unit does not include the Oregon Inlet Fishing Center, NC Highway 12, and the Bonner Bridge or its associated structures, or any of their ancillary facilities (e.g., parking lots, outbuildings). All of these features occur outside the boundary of the unit except for a small number of supports for Bonner Bridge, which are within the boundary but are excluded from critical habitat by text. Critical habitat begins immediately at the base of these supports.

Consistent use by wintering piping plovers has been reported at Oregon Inlet dating from the mid-1960s. As many as 100 piping plovers were reported from a single day survey during the fall migration (NCWRC unpublished data). Christmas bird counts regularly recorded 20 to 30 plovers using the area. Recent surveys have also recorded consistent and repeated use of the area by banded piping plovers from the endangered Great Lakes breeding population (J. Stucker, University of Minnesota unpublished data). However, the overall number of piping plovers reported using the area has declined since the species was listed in 1986 (NCWRC unpublished data), which corresponds to increases in the number of human users (NPS 2005) and off-road vehicles (Davis and Truett 2000).

Oregon Inlet is one of the first beach access points for ORVs within Cape Hatteras National Seashore when traveling from the developed coastal communities of Nags Head, Kill Devil Hills, Kitty Hawk, and Manteo. As such, the inlet spit is a popular area for ORV users to congregate. A recent visitor use study of the park reported that Oregon Inlet is the second most popular ORV use area in the park (Vogelsong 2003). The majority of the Cape Hatteras National Seashore users in this area are ORV owners and recreational fishermen. As a result, sandy beach and mud and sand flat habitat being proposed as critical habitat in this unit may require special management considerations or protection, as discussed in “Special Management Considerations or Protections” above.

#### *Unit NC-2: Cape Hatteras Point*

Unit NC-2 consists of 645.8 ac (261.4 ha) of sandy beach and sand and mud flat habitat in Dare County, North Carolina. Cape Hatteras Point (also known as Cape Point or Hatteras Cove) is located south of the Cape Hatteras Lighthouse. The unit extends south approximately 2.8 mi (4.5 km) from the ocean groin near the old location of the Cape Hatteras Lighthouse to the point of Cape Hatteras, and then extends west 4.7 mi (7.6 km) along Hatteras Cove shoreline (South Beach) to the edge of Ramp 49 near the Frisco Campground. This unit includes lands from the MLLW on the Atlantic Ocean shoreline to the line of stable, densely vegetated dune habitat (which is not used by piping plovers and where PCEs do not occur). This unit contains the features essential to the conservation of the species (i.e., PCEs), as discussed above. This unit does not include the ocean groin.

Consistent use by wintering piping plover has been reported at Cape Hatteras Point since the early 1980s, but the specific area of use was not consistently recorded in earlier reports. Often piping plovers found at Cape Hatteras Point, Cape Hatteras Cove, and Hatteras Inlet were reported as a collective group. However, more recent surveys report plover use at Cape Hatteras Point independently from Hatteras Inlet. These single day surveys have recorded as many as 13 piping plovers a day during migration (NCWRC unpublished data). Christmas bird counts regularly recorded 2 to 11 plovers using the area.

Cape Hatteras Point is located near the Town of Buxton, the largest community on Hatteras Island. For that reason, Cape Hatteras Point is a popular area for ORV and recreational fishing. A recent visitor use study of the park found that Cape Hatteras Point had the most ORV use within the park (Vogelsong 2003). As a result, sandy beach and mud and sand flat habitat being proposed as critical habitat in this unit may require special management considerations or protection, as discussed in "Special Management Considerations or Protections" above.

#### *Unit NC-4: Hatteras Inlet*

Unit NC-4 is approximately 4.7 mi (7.6 km) long, and consists of 395.6 ac (160.1 ha) of sandy beach and inlet spit habitat on the western end of Hatteras Island and the eastern end of Ocracoke Island in Dare and Hyde counties, North Carolina. The unit begins at the first beach access point at the edge of Ramp 55 near the Graveyard of the Atlantic Museum on the western end of Hatteras Island and continues southwest to the beach access at the edge of the ocean-side parking lot near Ramp 59 on the northeastern end of Ocracoke Island. This unit includes lands from the MLLW on the Atlantic Ocean shoreline to the line of stable, densely vegetated dune habitat (which is not used by the piping plover and where PCEs do not occur) and from the MLLW on the Pamlico Sound side to the line of stable, densely vegetated habitat, or (where a line of stable, densely vegetated dune habitat does not exist) lands from MLLW on the Atlantic Ocean shoreline to the MLLW on the Pamlico Sound side. The proposed unit at Hatteras Inlet includes all emergent sandbars within Hatteras Inlet. This unit contains the features essential to the conservation of the species (i.e., PCEs), as discussed above.

As we discuss in "Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act" below, this

unit does not include lands owned by the State of North Carolina such as Island DR-009-03/04. In addition, the unit does not include the Graveyard of the Atlantic Museum, the ferry terminal, the groin on Ocracoke Island, NC Highway 12, or their ancillary facilities (e.g., parking lots, out buildings). All of these features occur outside the boundary of the proposed unit.

Consistent use by wintering piping plover has been reported at Hatteras Inlet since the early 1980s, but the specific area of use was not consistently recorded in earlier reports. Often piping plovers found at Cape Hatteras Point, Cape Hatteras Cove, and Hatteras Inlet were reported as a collective group. However, more recent surveys report plover use at Hatteras Inlet independently from Cape Hatteras Point. These single day surveys have recorded as many as 40 piping plovers a day during migration (NCWRC unpublished data). Christmas bird counts regularly recorded 2 to 11 plovers using the area. Recent surveys have also recorded consistent and repeated use of the area by banded piping plovers from the endangered Great Lakes breeding population (J. Stucker, University of Minnesota unpublished data). However, the overall numbers of piping plovers reported using the area has declined in the last 10 years (NCWRC unpublished data), corresponding with increases in the number of human users (NPS 2005) and ORVs (Davis and Truett 2000).

Hatteras Inlet is located near the Village of Hatteras, Dare County, and is the southernmost point of Cape Hatteras National Seashore that can be reached without having to take a ferry. As such, the inlet is a popular off-road vehicle and recreational fishing area. In fact, a recent visitor use study of the park found Hatteras Inlet the fourth most used area by off-road vehicles in the park (Vogelsong 2003). As a result, sandy beach and mud and sand flat habitat being proposed as critical habitat in this unit may require special management considerations or protection, as discussed in "Special Management Considerations or Protections" above.

#### *Unit NC-5: Ocracoke Island*

Unit NC-5 consists of 501.8 ac (203.0 ha) of sandy beach and mud and sand flat habitat in Hyde County, North Carolina. The unit includes the western portion of Ocracoke Island beginning at the beach access point at the edge of Ramp 72 (South Point Road), extending west approximately 2.1 mi (3.4 km) to Ocracoke Inlet, and then back east on the Pamlico Sound side to a point where

stable, densely vegetated dune habitat meets the water. This unit includes lands from the MLLW on the Atlantic Ocean shoreline to the line of stable, densely vegetated dune habitat (which is not used by the piping plover and where primary constituent elements do not occur) and from the MLLW on the Pamlico Sound side to the line of stable, densely vegetated habitat, or (where a line of stable, densely vegetated dune habitat does not exist) lands from MLLW on the Atlantic Ocean shoreline to the MLLW on the Pamlico Sound side. The unit includes all emergent sandbars within Ocracoke Inlet. This unit contains the features essential to the conservation of the species (i.e., PCEs), as discussed above. The unit is adjacent to but does not include NC Highway 12, any portion of the maintained South Point Road at Ramp 72, or any of their ancillary facilities.

Ocracoke Island had inconsistent recorded use by wintering piping plovers in the early 1980s, and Christmas bird counts recorded only 1 to 6 plovers using the area throughout the early 1990s. However, since the late 1990s when regular and consistent surveys of the area were conducted, as many as 72 piping plovers have been recorded during migration, and 4 to 18 plovers have been regularly recorded during the overwinter period (NCWRC unpublished data). Recent surveys have also recorded consistent and repeated use of the area by banded piping plovers from the endangered Great Lakes breeding population (J. Stucker, University of Minnesota unpublished data).

Ocracoke Inlet is located near the Village of Ocracoke, and is the southernmost point of the Cape Hatteras National Seashore. Ocracoke Island is only accessible by ferry. As such, the island is a popular destination for vacationers and locals interested in seclusion. The inlet is also a popular recreational fishing and ORV area. A recent visitor use study of the park reported Ocracoke Inlet was the third most popular ORV use area in the park (Vogelsong 2003). As a result, the primary threat to the wintering piping plover and its habitat within this unit is disturbance to and degradation of foraging and roosting areas by ORVs and by people and their pets. Therefore, sandy beach and mud and sand flat habitat being proposed as critical habitat in this unit may require special management considerations or protection, as discussed in "Special Management Considerations or Protections" above.



## Effects of Critical Habitat Designation

### Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” However, recent decisions by the 5th and 9th Circuit Court of Appeals have invalidated this definition (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)). Pursuant to current national policy and the statutory provisions of the Act, destruction or adverse modification is determined on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve the intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only. However, once a proposed species becomes listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) apply to any Federal action. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider proposed species and critical habitat and avoid potential delays in implementing their proposed action as a result of the section 7(a)(2) compliance process, should those species be listed or the critical habitat designated.

Under conference procedures, the Service may provide advisory conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The Service may conduct either informal or formal conferences. Informal conferences are typically used if the proposed action is not likely to have any adverse effects to the proposed species or proposed critical habitat. Formal conferences are typically used when the Federal agency or the Service believes the proposed action is likely to cause adverse effects to proposed species or critical habitat, inclusive of those that may cause jeopardy or adverse modification.

The results of an informal conference are typically transmitted in a conference report; while the results of a formal conference are typically transmitted in a conference opinion. Conference opinions on proposed critical habitat are typically prepared according to 50 CFR 402.14, as if the proposed critical habitat were designated. We may adopt the conference opinion as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). As noted above, any conservation recommendations in a conference report or opinion are strictly advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, compliance with the requirements of section 7(a)(2) will be documented through the Service's issuance of: (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or (2) a biological opinion for Federal actions that may affect, but are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to result in jeopardy to a listed species or the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. “Reasonable and prudent alternatives” are defined at 50 CFR 402.02 as alternative actions identified during

consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid jeopardy to the listed species or destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated that may be affected and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions may affect subsequently listed species or designated critical habitat or adversely modify or destroy proposed critical habitat.

Federal activities that may affect the wintering population of the piping plover or its designated critical habitat will require section 7 consultation under the Act. Activities on State, tribal, local or private lands requiring a Federal permit (such as a permit from the Corps under section 404 of the Clean Water Act or a permit under section 10(a)(1)(B) of the Act from the Service) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

### *Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to the Wintering Population of the Piping Plover and Its Critical Habitat*

#### Jeopardy Standard

Prior to and following designation of critical habitat, the Service has applied an analytical framework for wintering population of the piping plover

jeopardy analyses that relies heavily on the importance of core area populations to the survival and recovery of the wintering population of the piping plover. The section 7(a)(2) analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of the wintering population of the piping plover in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of a core area population(s), inclusive of associated habitat conditions, a jeopardy finding is considered to be warranted, because of the relationship of each core area population to the survival and recovery of the species as a whole.

#### Adverse Modification Standard

The analytical framework described in the Director's December 9, 2004, memorandum is used to complete section 7(a)(2) analyses for Federal actions affecting wintering population of the piping plover critical habitat. The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species. Generally, the conservation role of wintering population of the piping plover critical habitat units is to support viable core area populations.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the species. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the conservation value of critical habitat for the wintering population of the piping plover is appreciably reduced. Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore result in consultation for the wintering population of the piping plover include, but are not limited to:

(1) Actions that would significantly and detrimentally alter the hydrology of

tidal mud and sand flats or ephemeral ponds or pools.

(2) Actions that would significantly and detrimentally alter the input of sediments and nutrients necessary for the maintenance of geomorphic and biologic processes that ensure appropriately configured and productive beach systems.

(3) Actions that would introduce significant amounts of emergent vegetation.

(4) Actions that would significantly and detrimentally alter the topography of a site (such alteration may affect the hydrology of an area or may render an area unsuitable for roosting).

(5) Actions that would reduce the value of a site by significantly disturbing plovers from activities such as foraging and roosting.

(6) Actions that would significantly and detrimentally alter water quality, that may lead to decreased diversity or productivity of prey organisms or may have direct detrimental effects on piping plovers.

(7) Actions that would impede natural processes that create and maintain washover passes and sparsely vegetated intertidal feeding habitats.

These activities could eliminate or reduce the habitat necessary for foraging by eliminating or reducing the piping plovers' prey base; destroying or removing available upland habitats necessary for protection of the birds during storms or other harsh environmental conditions; increasing the amount of vegetation to levels that make foraging or roosting habitats unsuitable; and increasing recreational activities to such an extent that the amount of available undisturbed foraging or roosting habitat is reduced, with direct or cumulative adverse effects to individuals and completion of their life cycles.

We consider all of the units proposed as critical habitat to contain features essential to the conservation of the wintering population of the piping plover. All units are within the geographic range of the species, all were occupied by the species at the time of listing, and are likely to be used by the wintering population of the piping plover. Federal agencies already consult with us on activities in areas currently occupied by the wintering population of the piping plover, or if the species may be affected by the action, to ensure that their actions do not jeopardize the continued existence of the wintering population of the piping plover.

#### *Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act*

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographical area occupied by the species on which are found those physical and biological features (i) essential to the conservation of the species, and (ii) which may require special management considerations or protection. Therefore, areas within the geographical area occupied by the species that do not contain the features essential to the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographical area occupied by the species that require no special management or protection also are not, by definition, critical habitat.

There are multiple ways to provide management for species habitat. Statutory and regulatory frameworks that exist at a local level can provide such protection and management, as can lack of pressure for change, such as areas too remote for anthropogenic disturbance. Finally, State, local, or private management plans as well as management under Federal agencies jurisdictions can provide protection and management to avoid the need for designation of critical habitat. When we consider a plan to determine its adequacy in protecting habitat, we consider whether the plan, as a whole will provide the same level of protection that designation of critical habitat would provide. The plan need not lead to exactly the same result as a designation in every individual application, as long as the protection it provides is equivalent, overall. In making this determination, we examine whether the plan provides management, protection, or enhancement of the PCEs that is at least equivalent to that provided by a critical habitat designation, and whether there is a reasonable expectation that the management, protection, or enhancement actions will continue into the foreseeable future. Each review is particular to the species and the plan, and some plans may be adequate for some species and inadequate for others.

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides a conservation benefit to the species (i.e., the plan must maintain or provide for an increase in the species' population, or the enhancement or restoration of its habitat within the area covered by the plan); (2) the plan provides assurances that the conservation management strategies and

actions will be implemented (i.e., those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation schedule or adequate funding for implementing the management plan); and (3) the plan provides assurances that the conservation strategies and measures will be effective (i.e., it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

In evaluating areas proposed for the designation of critical habitat, we considered islands owned by the State of North Carolina located within or in proximity to Oregon, Hatteras, and Ocracoke inlets, in Dare and Hyde counties. We have determined that the features essential to the conservation of the piping plover in following areas—DR-005-05 and DR-005-06 in Oregon Inlet, Dare County and DR-009-03/04 in Hatteras Inlet, Dare and Hyde counties “do not require special management or protection and, therefore, do not meet the definition of critical habitat. Thus, the areas containing these features (i.e., the islands) are not included in this proposal. These islands are specifically managed for waterbirds by the North Carolina Wildlife Resources Commission as defined in a February 5, 1992, letter signed by James S. Lofton, Secretary, North Carolina Department of Administration. The North Carolina Wildlife Resources Commission also has developed a comprehensive wildlife conservation strategy entitled “A Wildlife Action Plan for North Carolina” (NCWRC 2005). In this document, species and habitat assessments and conservation strategies are discussed for the protection of estuarine and beach and dune communities and priority species associated with those habitats, including federally listed species such as the piping plover. The Wildlife Action Plan identifies the piping plover as a priority species needing research, survey, and monitoring efforts to assist in restoration and conservation efforts. Conservation actions identified in the plan to be implemented by the North Carolina Wildlife Resources Commission include estuarine and beach and dune community habitat protection and restoration; coordination with agencies in the enforcement of the Endangered Species Act and the Migratory Bird Treaty Act; education and outreach efforts directed toward the public and regulatory agencies to emphasize the ephemeral nature of sand and mud flats so these habitats will not

be destroyed; increasing public awareness concerning potential impacts of recreational activities; building and encouraging setback distances and buffer zones; and continued coordination with waterbird working groups such as the Piping Plover Recovery Team. Based on the islands' limited access for recreational use, implementation of the Wildlife Action Plan, and the specific management of the islands for waterbirds, we have determined that (1) the physical and biological features essential to the conservation of the piping plover are covered under these provisions and conservation programs, (2) that sufficient assurances are in place such that the conservation and protection measures are and will be implemented, and (3) that sufficient assurances are in place that conservation and protection measures are and will be effective and provide a conservation benefit to the PCEs and the species. Consequently, we believe that the features essential to the conservation of the piping plover in the following areas—DR-005-05 and DR-005-06 in Oregon Inlet, Dare County and DR-009-03/04 in Hatteras Inlet, Dare and Hyde counties—do not require special management or protection and, therefore, do not meet the definition of critical habitat. Thus, the areas containing these features (i.e., the islands) are not included in this proposal. These islands represent the only areas under consideration in this proposal that are owned by the State of North Carolina and are therefore the only areas subject to the Wildlife Action Plan.

In addition, we considered Pea Island National Wildlife Refuge (Dare County) as an area proposed for the designation of critical habitat. While portions of the refuge, totaling approximately 237 ac (96 ha), contain the habitat features that are essential to the conservation of the species, we have determined that the refuge does not require special management or protection and, therefore, is not included in this proposal. The refuge has a statutory mandate to manage the refuge for the conservation of listed species, and a draft Comprehensive Conservation Plan (CCP; USFWS 2006) provides a detailed implementation plan which includes preserving, protecting, creating, restoring, and managing foraging and roosting habitats for the piping plover. The draft CCP was made available to the public on February 2, 2006 for a 30 day comment period, which ended on March 6, 2006. The final CCP will likely be completed by the end of 2006.

The draft CCP more specifically describes the refuge's objectives to meet

its goals. Specific to the piping plover, the objective is to “protect and monitor use of nesting, foraging, and wintering habitat by piping plovers continuously.” Strategies to achieve this goal include monitoring piping plovers, signing and closing active nesting areas, and protecting piping plovers from predators (e.g., raccoons, feral cats), as needed. We have determined that (1) the physical and biological features essential to the conservation of the piping plover are covered under the draft CCP for the refuge, (2) that sufficient assurances are in place such that the CCP will be finalized and that the conservation and protection measures are and will be implemented, and (3) that sufficient assurances are in CCP that conservation and protection measures are and will be effective and provide a conservation benefit to the primary constituent elements and the species. As a result of Pea Island's refuge-wide effort and long-term commitment to provide piping plover habitat, we believe the physical and biological features for the piping plover in this area do not require special management or protection and, therefore, do not meet the definition of critical habitat. Thus, the areas containing these features (i.e., Pea Island National Wildlife Refuge) are not included in this proposal.

Further, section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if [s]he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the Secretary is afforded broad discretion and the Congressional record is clear that in making a determination under the section the Secretary has discretion as to which factors and how much weight will be given to any factor.

Under section 4(b)(2), in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, determine whether the benefits of exclusion outweigh the benefits of inclusion. If an exclusion is contemplated, then we must determine whether excluding the area would result

in the extinction of the species. In the following sections, we address a number of general issues that are relevant to the exclusions we considered. In addition, the Service is conducting an economic analysis of the impacts of the proposed critical habitat designation and related factors, which will be available for public review and comment. Pursuant to the November 1, 2004 opinion in *Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior* (344 F. Supp. 2d 108 (D.D.C. 2004)), this analysis will focus on the impacts to ORV use and costs of consulting on National Park Service activities. Based on public comment on that document, the proposed designation itself, and the information in the final economic analysis, additional areas beyond those identified in this assessment may be excluded from critical habitat by the Secretary under the provisions of section 4(b)(2) of the Act. This is provided for in the Act, and in our implementing regulations at 50 CFR 242.19.

In evaluating areas proposed for the designation of critical habitat, we considered that Cape Hatteras National Seashore has developed and submitted for public comment a proposed Interim Protected Species Management Strategy/ Environmental Assessment (Interim Strategy). In addition, the Seashore has determined in a Biological Assessment that implementation of the proposed Interim Strategy is likely to adversely affect the piping plover. Therefore, the Seashore has entered into formal consultation with the Service under section 7 of the Act. The consultation is currently ongoing. The Interim Strategy is proposed to address recreational access and the associated management of federally-listed species on the Seashore until an Off-road Vehicle Management Plan (ORV Plan) is completed to address vehicular access. The ORV Plan is proposed for development through a negotiated rulemaking process that is tentatively scheduled to take three years to complete. The negotiated rulemaking process was recently initiated, but information on its ultimate effects on the piping plover or the species' habitat is unknown at this time. The Service will coordinate with the Seashore in the development of the ORV Plan and the potential impacts it may have on the piping plover and other federally-listed species. Lands containing the physical and biological features essential to the conservation of the piping plover on the Seashore and affected by the Interim Strategy are proposed as critical habitat. However, we specifically solicit

comments on the inclusion or exclusion of such areas.

### Economic Analysis

An analysis of the economic impacts of proposing critical habitat for the wintering population of the piping plover is being prepared. Pursuant to the November 1, 2004 opinion in *Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior* (344 F. Supp. 2d 108 (D.D.C. 2004)), this analysis will focus on the impacts to ORV use and costs of consulting on National Park Service activities. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at <http://nc-es.fws.gov>, or by contacting the Raleigh Fish and Wildlife Office directly (see **ADDRESSES** section).

### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

### Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing at least 15 days prior to the close of the public comment period. We intend to schedule public hearings once the draft economic analysis is available such that we can take public comment on the proposed designation and economic analysis simultaneously. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local

newspapers at least 15 days prior to the first hearing.

### Editorial Changes

We are also proposing to consolidate the entry for piping plover in the list of Endangered and Threatened Wildlife at 50 CFR 17.11(h). Currently, the entry separates the threatened populations of this species in two rows. In this proposal, we are combining them into one row. This change would not affect the listing status of any populations of piping plover.

### Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

### Required Determinations

#### Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the specific area as critical habitat. This economic analysis also will be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement

Fairness Act, and Executive Order 12630.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are listed above in the section on Section 7 Consultation. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments. The draft economic analysis can be obtained from the Internet Web site at <http://nces.fws.gov> or by contacting the Raleigh Fish and Wildlife Office directly (see **ADDRESSES** section).

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and Executive Order 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 60 days. The Service will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. The Service has

concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

*Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for the wintering population of the piping plover in areas of North Carolina is a significant rule under Executive Order 12866 in that it may raise novel legal and policy issues, however, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or tribal governments "lack authority" to adjust

accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because only Federal lands are proposed for designation. As such, Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis, and we will revise this assessment if appropriate.

*Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in North Carolina. The designation of critical habitat on Federal lands currently occupied by the wintering population of the piping plover imposes no additional restrictions to those currently in place and, therefore, has

little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

*Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the wintering population of the piping plover.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not

required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

It has been our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the National Environmental Policy Act (NEPA) in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). However, the court in *Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior* (344 F. Supp. 2d 108 (D.D.C. 2004)), in ordering us to revise the critical habitat designation, ordered us to prepare an environmental analysis. To comply with the court's order, we are preparing an environmental assessment pursuant to NEPA and will notify the public of its availability when it is finished.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no tribal lands with features essential for the conservation of the wintering population of the piping plover in the areas of North Carolina that we are

proposing to designate as critical habitat. Therefore, this rule does not propose critical habitat for the wintering population of the piping plover on tribal lands.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Raleigh Fish and Wildlife Office (see **ADDRESSES** section).

**Author(s)**

The primary author of this package is the Raleigh Fish and Wildlife Office.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17—[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by revising the entry for the "Plover, piping" under BIRDS in the List of Endangered and Threatened Wildlife to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
BIRDS							
*	*	*	*	*	*		*
Plover, piping .....	<i>Charadrius melodus</i>	U.S.A. (Great Lakes, northern Great Plains, Atlantic and Gulf Coasts, PR, VI), Canada, Mexico, Bahamas, West Indies.	Great Lakes, watershed in States of IL, IN, MI, MN, NY, OH, PA, and WI and Canada (Ont.).	E	211	17.95(b)	NA
Plover, piping .....	<i>Charadrius melodus</i>	U.S.A. (Great Lakes, northern Great Plains, Atlantic and Gulf Coasts, PR, VI), Canada, Mexico, Bahamas, West Indies.	Entire, except where listed as endangered.	T	211	17.95(b)	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*

3. In § 17.95(b), amend the entry for “Piping Plover (*Charadrius melodus*) Wintering Habitat” as follows:

- a. In paragraph 1., revise the text as set forth below;
- b. In paragraph 2., revise the text as set forth below;
- c. Under 3., remove the words “North Carolina (Maps were digitized using 1993 DOQQs, except NC-3 (1993 DRG))” and add in their place a new header and parenthetical text as set forth below;
- d. Remove the critical habitat description for Unit NC-1 and add in its place a new critical habitat description for Unit NC-1 as set forth below;
- e. Remove the critical habitat description for Unit NC-2 and add in its place a new critical habitat description for Unit NC-2 as set forth below;
- f. Remove the critical habitat description for Unit NC-4 and add in its place a new critical habitat description for Unit NC-4 as set forth below;
- g. Remove the critical habitat description for Unit NC-5 and add in its place a new critical habitat description for Unit NC-5 as set forth below;
- h. Remove the first map for “North Carolina Unit: 1” and add in its place a new map “North Carolina Unit: 1” as set forth below; and
- i. Remove the second map for “North Carolina Units: 2, 3, 4, 5, & 6” and add in its place a new map “North Carolina Units: 2, 3, 4, 5, & 6” as set forth below.

**§ 17.95 Critical habitat—fish and wildlife.**

\* \* \* \* \*

(b) *Birds.*

\* \* \* \* \*

Piping Plover (*Charadrius melodus*) Wintering Habitat

\* \* \* \* \*

1. The primary constituent elements essential for the conservation of wintering piping plovers are those habitat components that support foraging, roosting, and sheltering and the physical features necessary for maintaining the natural processes that support these habitat components. The primary constituent elements are: (1) Intertidal beaches and flats (between annual low tide and annual high tide) and associated dune systems and flats above annual high tide. (2) Sand and/or mud flats with no or very sparse emergent vegetation. These flats may be covered or partially covered by a mat of blue-green algae. (3) Adjacent unvegetated or sparsely vegetated sand, mud, or algal flats above high tide for roosting piping plovers. Such sites may have debris, detritus

(decaying organic matter), or micro-topographic relief (less than 50 cm above substrate surface) offering refuge from high winds and cold weather. (4) Surf-cast algae for feeding of prey. (5) Sparsely vegetated backbeach (beach area above mean high tide seaward of the dune line, or in cases where no dunes exist, seaward of a delineating feature such as a vegetation line, structure, or road) for roosting and refuge during storms, spits (a small point of land, especially sand, running into water) for feeding and roosting. (6) Salterns (bare sand flats in the center of mangrove ecosystems that are found above mean high water and are only irregularly flushed with sea water). (7) Washover areas for feeding and roosting. Washover areas are broad, unvegetated zones with little or no topographic relief that are formed and maintained by the action of hurricanes, storm surge, or other extreme wave action. (8) Natural conditions of sparse vegetation and little or no topographic relief mimicked in artificial habitat types (e.g., dredge spoil sites).

2. Critical habitat does not include manmade structures (such as bridges, ocean groins, buildings, aqueducts, airports, roads, and other paved areas) or their ancillary facilities (such as lawns, flower beds, or other maintained landscaped areas) and the land on which they are located existing on the effective date of this rule.

3. \* \* \*

*North Carolina* (Data layers defining map units 1, 2, 4, and 5 were created from GPS data collected in the field in May and June of 2005, and modified to fit the 1:100,000 scale North Carolina county boundary with shoreline (cb100sl) data layer from the BasinPro 8 data set published by the North Carolina Center for Geographic Information and Analysis, which was compiled in 1990. Other map units were digitized using 1993 DOQQs, except NC-3 which utilized 1993 DRG.)

**Unit NC-1: Oregon Inlet, 114.9 ha (284.0 ac) in Dare County, North Carolina**

This unit is within Cape Hatteras National Seashore and extends from the southern portion of Bodie Island to Oregon Inlet. It begins at the edge of Ramp 4 near the Oregon Inlet Fishing Center on Bodie Island and extends south approximately 2.8 km (1.7 mi) to Oregon Inlet. This unit includes lands from the mean lower low water (MLLW) on the Atlantic Ocean shoreline to the line of stable, densely vegetated dune habitat (which is not used by the piping plover and where primary constituent elements do not occur) and from the MLLW on the Pamlico Sound side to the line of stable, densely vegetated habitat, or (where a line of stable, densely vegetated dune habitat does not exist) lands from MLLW on the Atlantic Ocean shoreline to the MLLW on the Pamlico Sound side.

Any emergent sandbars south and west of Oregon Inlet are included, except lands owned by the State of North Carolina such as islands DR-005-05 and DR-005-06 (not shown on map).

**Unit NC-2: Cape Hatteras Point, 261.4 ha (645.8 ac) in Dare County, North Carolina**

This unit is within Cape Hatteras National Seashore and encompasses the point of Cape Hatteras (Cape Point). The unit extends south approximately 4.5 km (2.8 mi) from the ocean groin near the old location of the Cape Hatteras Lighthouse to the point of Cape Hatteras, and then extends west 7.6 km (4.7 mi) (straight-line distances) along Hatteras Cove shoreline (South Beach) to the edge of Ramp 49 near the Frisco Campground. The unit includes lands from the MLLW on the Atlantic Ocean to the line of stable, densely vegetated dune habitat (which is not used by the piping plover and where primary constituent elements do not occur). This unit does not include the ocean groin.

\* \* \* \* \*

**Unit NC-4: Hatteras Inlet, 106.1 ha (395.6 ac) in Dare and Hyde Counties, North Carolina**

This unit is within Cape Hatteras National Seashore and extends from the western end of Hatteras Island to the eastern end of Ocracoke Island. The unit extends approximately 4.5 km (2.8 mi) southwest from the first beach access point at the edge of Ramp 55 at the end of NC Highway 12 near the Graveyard of the Atlantic Museum on the western end of Hatteras Island to the edge of the beach access point at the ocean-side parking lot (approximately 0.1 mile south of Ramp 59) on NC Highway 12, approximately 1.25 km (0.78 miles) southwest (straight-line distance) of the ferry terminal on the northeastern end of Ocracoke Island. This unit includes lands from the MLLW on the Atlantic Ocean shoreline to the line of stable, densely vegetated dune habitat (which is not used by the piping plover and where primary constituent elements do not occur) and from the MLLW on the Pamlico Sound side to the line of stable, densely vegetated habitat, or (where a line of stable, densely vegetated dune habitat does not exist) lands from MLLW on the Atlantic Ocean shoreline to the MLLW on the Pamlico Sound side. All emergent sandbars within Hatteras Inlet between Hatteras Island and Ocracoke Island are also included, except lands owned by the State of North Carolina such as Island DR-009-03/04 (not shown on map).

**Unit NC-5: Ocracoke Island, 203.0 ha (501.8 ac) in Hyde County, North Carolina**

This unit is within Cape Hatteras National Seashore and includes the western portion of Ocracoke Island beginning at the beach access point at the edge of Ramp 72 (South

Point Road), extending west approximately 3.4 km (2.1 mi) to Ocracoke Inlet, and then back east on the Pamlico Sound side to a point where stable, densely vegetated dune habitat meets the water. This unit includes lands from the MLLW on the Atlantic Ocean shoreline to the line of stable, densely vegetated dune habitat (which is not used by

the piping plover and where primary constituent elements do not occur) and from the MLLW on the Pamlico Sound side to the line of stable, densely vegetated habitat, or (where a line of stable, densely vegetated dune habitat does not exist) lands from MLLW on the Atlantic Ocean shoreline to the MLLW on the Pamlico Sound side. All

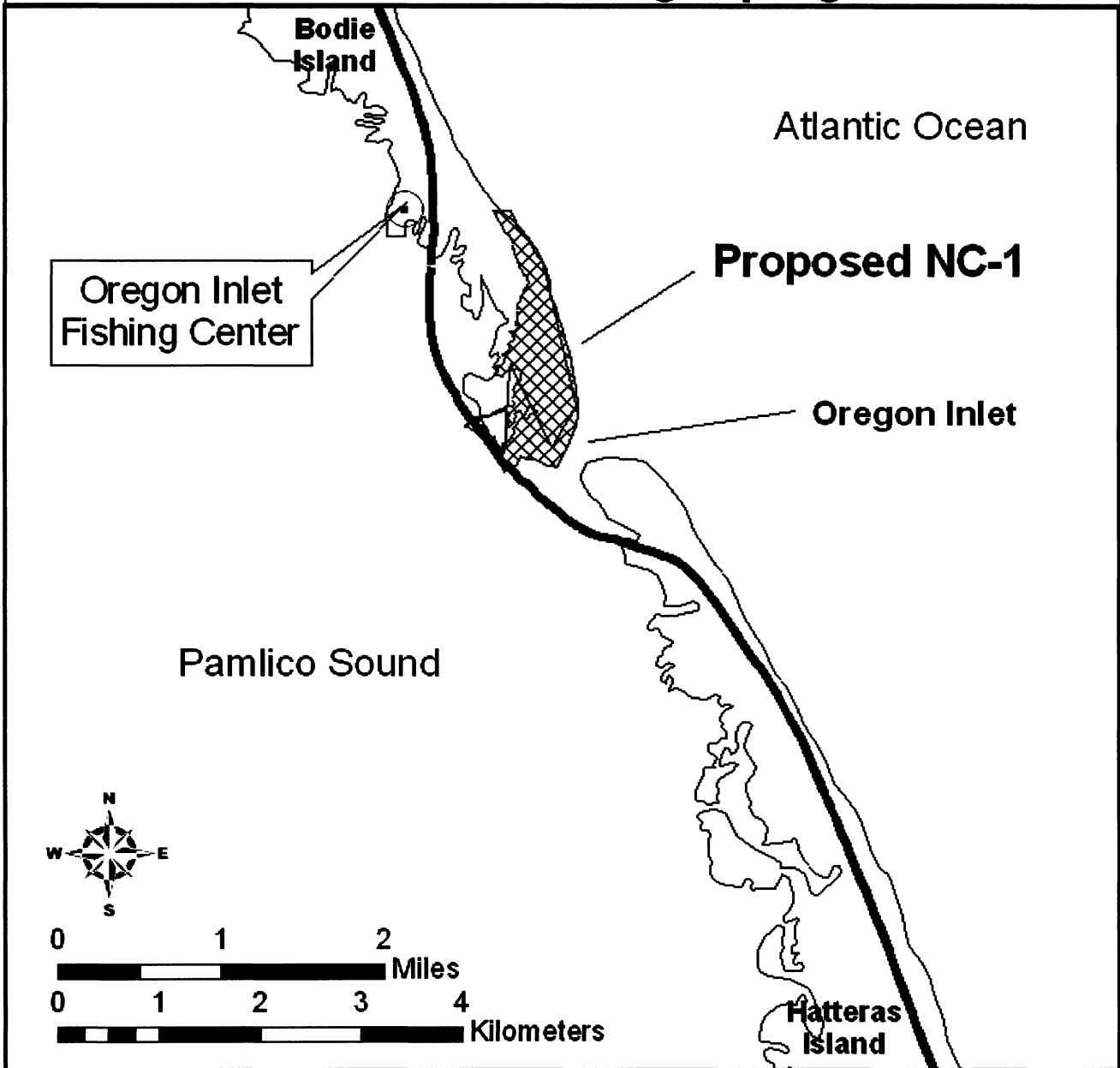
emergent sandbars within Ocracoke Inlet are also included. This unit does not include any portion of the maintained South Point Road, NC Highway 12, or any of their ancillary facilities.

\* \* \* \* \*



**BILLING CODE 4310-55-P**



# General locations of the proposed critical habitat for the Wintering Piping Plover.

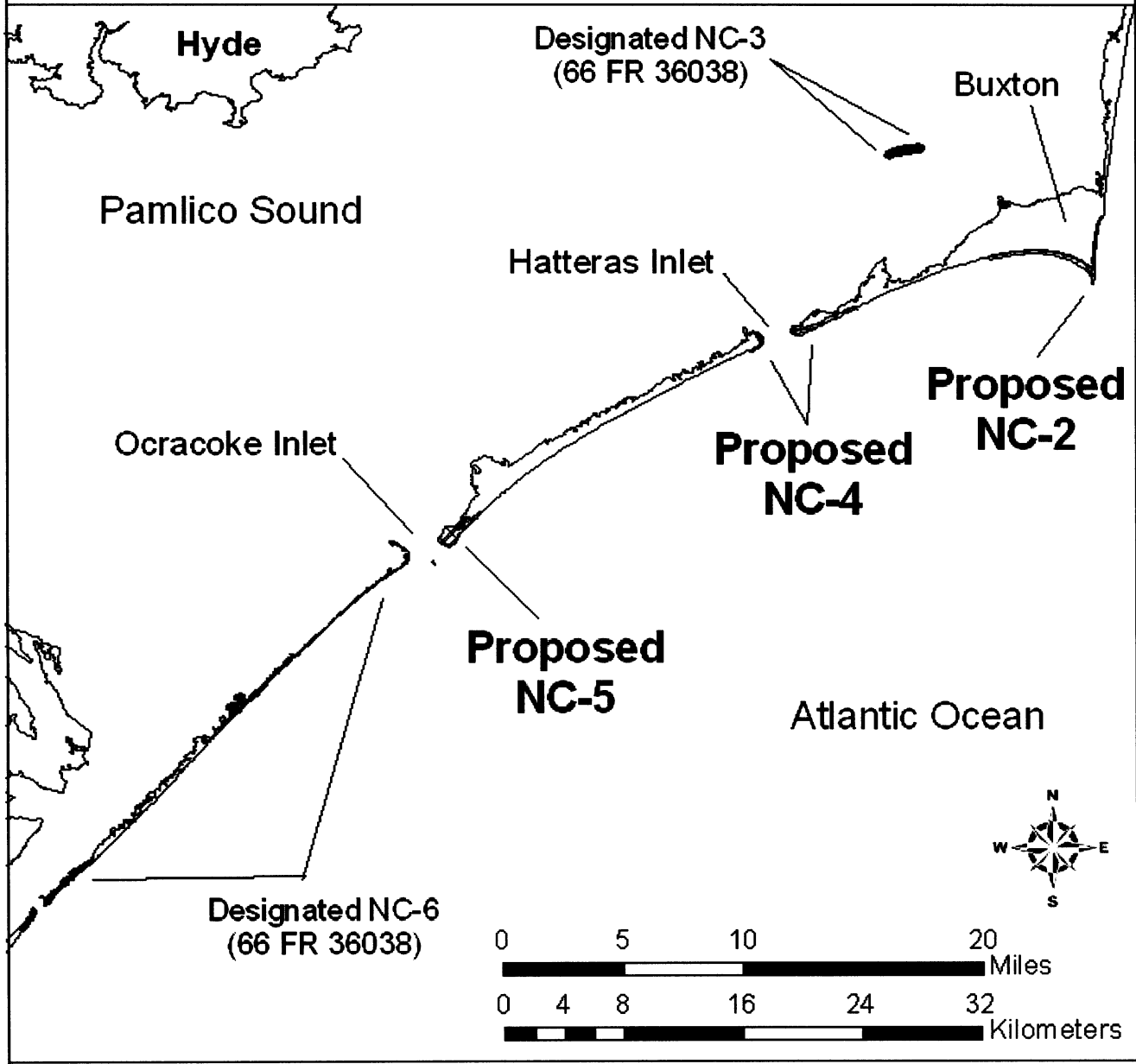


### Legend

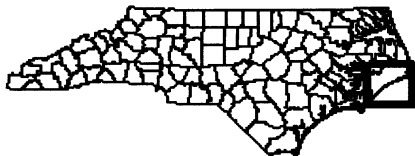
-  Wintering Piping Plover Proposed Critical Habitat Unit
-  State Highway NC-12

## North Carolina Unit: 1

# General locations of the proposed critical habitat for the Wintering Piping Plover.



North Carolina



### Legend

 Wintering Piping Plover Proposed Critical Habitat Units

## North Carolina Units: 2, 3, 4, 5, & 6

\* \* \* \* \*

Dated: May 31, 2006.

**Matt Hogan,***Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 06-5192 Filed 6-9-06; 8:45 am]

BILLING CODE 4310-55-C

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 648**

[Docket No. 060515131-6131-01; I.D. 050806B]

RIN 0648-AU49

**Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Amendment 14; Small-mesh Multispecies Limited Access Program and Control Date****AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.**ACTION:** Advance notice of proposed rulemaking (ANPR); reaffirmation of a control date for the small-mesh multispecies fishery; request for comments.**SUMMARY:** NMFS announces consideration of proposed rulemaking to control future access to the New England small-mesh multispecies (whiting) fishery. The New England Fishery Management Council (Council) has indicated that limited access may be necessary to control participation in the fishery at a level that reduces the risk of overcapitalization and constrains fishing to a level that minimizes the risks of overfishing or creating an overfished stock, as defined by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Northeast (NE) Multispecies Fishery Management Plan (FMP).

This announcement alerts interested parties of potential limitation on future access, commonly referred to as limited access, to discourage speculative entry into the fishery while the Council considers how access to the fishery should be controlled during the upcoming development of Amendment 14 to the FMP. By this notification, NMFS reaffirms, on behalf of the Council, that March 25, 2003, may be used as a "control date" to establish eligibility criteria for determining levels of future access to the fishery.

**DATES:** Written comments must be received by 5 p.m., local time, July 12, 2006.**ADDRESSES:** Written comments should be sent to Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA, 01950. Mark the outside of the envelope, "Comments on Small-mesh Multispecies Reaffirmation of Control Date." Comments also may be sent via facsimile (fax) to: (978) 465-3116. Comments may be submitted by e-mail as well. The mailbox address for providing e-mail comments is *SmallMeshControlDate@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: "Comments-SmallMeshControlDate." Comments may also be submitted electronically through the Federal e-Rulemaking portal: <http://www.regulations.gov>.**FOR FURTHER INFORMATION CONTACT:** Michael Ruccio, Fishery Policy Analyst, 978-281-9104; fax 978-281-9135.**SUPPLEMENTARY INFORMATION:** The New England small-mesh multispecies complex is composed of three species: Silver hake (whiting), *Merluccius bilinearis*; red hake (ling), *Urophycis chuss*; and offshore hake, *Merluccius albidus*. The fishery is currently an open access fishery, meaning anyone may apply for and receive a permit to commercially fish for small-mesh multispecies.

In the most recent Stock Assessment and Fishery Evaluation (SAFE) report published in 2003, the members of the Council's Whiting Monitoring Committee (WMC) indicated concerns about declining survey mean weights for both red and offshore hake in portions of their stock areas. The 2005 stock assessment summary for silver hake indicated continued declines in the overall northern stock biomass index from historic levels and the showed the southern stock biomass index to be above the management threshold but below the target level. The WMC has also expressed concern for the potential of a rapid expansion of the small-mesh fishery by new entrants displaced by declining stocks and tightening regulations in other fisheries. For these reasons, the Council may develop a limited access management program as part of Amendment 14 to the FMP to limit participation and afford additional input control protections to the small-mesh stocks.

The Council initially considered limiting entry into the small-mesh multispecies fishery by establishing September 9, 1996 (61 FR 47473), as the

control date for determining eligibility criteria. The Council used this control date to propose a limited access program as part of Amendment 12 to the FMP. However, the limited access program was not approved in the final Amendment 12 rule (65 FR 16766, March 29, 2000) because it was determined to be inconsistent with certain provisions of the Magnuson-Stevens Act.

By 2003, the Council recognized that fishing practices had substantially changed in the small-mesh fishery. Many changes to the fishery resulted from actions contained in Amendment 5 and Framework 35 to the FMP. These actions restricted the use of small-mesh in some areas and created new small-mesh exemption areas in others that changed fishing dynamics. The Council acknowledged that these changes in the characteristics of the small-mesh fishery had made the 1996 control date an unreliable indicator of historic participation. As a result, NMFS published a second control date for determining limited entry criteria at the request of the Council on March 25, 2003 (68 FR 14388). The Council implemented this second control date citing the previously mentioned changes to fishing practices and locations and to address the potential overcapitalization concerns expressed by the WMC. The intent of both control dates was to discourage speculative entry into the fishery while potential management regimes to control access into the fishery were discussed and possibly developed by the Council.

The Council is now beginning to develop Amendment 14 to the FMP, which will pertain to the small-mesh multispecies fishery. This amendment is in the very early stages of development. At their April 4, 2006, meeting in Mystic, CT, the Council voted to request that NMFS publish an ANPR to reaffirm the most recent control date for this fishery (March, 25, 2003) and to notify the public of the potential development of a limited access program in Amendment 14. Other measures may be considered in the amendment development process; this announcement is for informational purposes only and does not commit the Council to this or any other specific actions. The Council has indicated that distribution of the final scoping document with public hearing dates will occur within the next few weeks. NMFS anticipates publishing the meeting notice for scoping public hearings in the Federal Register before the end of May 2006.

In order to be approved and implemented, any measures proposed